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HIGH COURT OF CHHATTISGARH AT BILASPUR (C.G.)

CRIMINAL REFERENCE No.1/2000

State of M.P.(Chhattisgarh)

-v-

Bhim Mohmmad

CRIMINAL APPEAL No. 2653/2000

Bhim Mohmmad

-v-

State of M.P (Chhattisgarh)

JUDGMENT for consideration

Sd/-

Judge

23-2-2001

Sd/-
Chief Justice

Post for 28-2-2001.

Sd/-
R.S. Garg
Judge

(23)

HIGH COURT OF CHHATTISGARH : AT BILASPUR

Criminal Reference No. 1/2000.

State of Madhya Pradesh ... Appellant

Vs.

Bhim Mohd. S/o Niyaz Mohd. ... Respondent

JUDGMENT

By Hon.Shri R.S. Garg,J.

This is a reference under Section 366 of the Code of Criminal Procedure, as the learned Additional Sessions Judge, Khairagarh (Sessions Division Rajanandgaon) in Sessions trial No.64/2000, vide its judgment dated 29.9.2000, finding the accused guilty under Section 302 I.P.C. has awarded extreme penalty/capital punishment. The accused being aggrieved by the judgment and sentences awarded to him has filed Criminal Appeal No.2653/2000 challenging the correctness,propriety and validity of the judgment and the findings recorded by it.

2). This judgment shall dispose of Criminal Reference No.1/2000 and Criminal Appeal No.2653/2000.

3). The charge against the accused is that in between 9th October,99 and 13th October,99 he committed murder of his mother Khwajan Bi and thereby committed an offence punishable under Section 302 I.P.C. The accused was also charged

for an offence punishable under Section 201 I.P.C. on the ground that to cause dis-appearance of the material evidence; after cutting the body of his mother into pieces, he packed the same in different bags, threw some bags in a rivulet (Nala) and some were burried in a pit used for stacking / placing the cow-dung.

4). The prosecution case in brief is that on 13.10.99 Sheikh Mohd. P.W.7 (Son of the accused) and Mohd. Chand P.W.1 (first cousin of the acgused) informed the police that Sheikh Mohd. had gone to his in-laws place on 3.10.99; after his return on 11.10.99 when he came to his house he found that his grand-mother Khwajan Bi was missing since 9.10.99 and her where-abouts were not known to any-body. He also reported that Khwajan Bi was a vegetable vendor, who left some tomatos with Shyambai who informed him that Khwajan Bi was not traceable. He also informed the police that people were whispering in the village that some parts of the body were lying in a rivulet; on that he along with Mohd. Chand, Azmal and one Rathore went to the spot where he found a piece of right hand which was wearing some ornaments and at some distance a leg was lying. He informed the police that after identifying the said ornaments he was convinced that the pieces of the body recovered were of his grand-mother's body. He also informed the police that at some distance a bag was lying under water, from which bad smell was coming. The said information

was recorded at marg No.13/99 on 13.10.99 at about 11.50 ~~or 11.45~~ p.m. The said recorded information has been exhibited as Ex.P/15. After receiving the information nothing was done on 13.10.99, but the police officer came to the said rivulet on 14.10.99. He recovered the pieces of the leg and hand which were indentified by Sheikh Mohd. and Mohd.Chand. Seizure of the said articles were effected , thereafter, Dehati-nalishi was lodged by P.W.1 Mohd.Chand. Memo of corpus (Naksha Panchayat Nama of the dead-body) was prepared; first information report was registered; on information received from the accused remaining parts of the body were recovered from a pit and almost at the same time an axe, sickle and Kurta (long shirt) belonging to the accused were recovered.

5). According to the prosecution the accused had some differences with his own monther because she had gifted or given away some part of the agricultural land to her daughter i.e. sister of the accused. The accused taking an exception to the conduct of his mother was publicly saying that some day he would murder his mother and cut her into pieces. On 14.10.99 the accused was arrested. After recovery of different pieces of the body, same were sent for post mortem. The doctor opined that cause of death was asphyxia due to throttling ~~x~~ and body was cut into pieces after the death of the deceased.

6). On completion of the investigation, finding that every needle of allegation was pointing towards

the guilt of the accused, a challan was filed against him. The learned trial Judge framed the charges as referred to above against the accused and put him to trial. After recording the statements of P.W.1 Mohd.Chand, P.W.2 Sameer Beg, P.W.3 Dr. A.K.Khare, P.W.4 R.C. Lahari, Assistant Sub-Inspector, P.W.5 Ishwar Prasad Yadav, Constable No.743, P.W.6 Salim, P.W.7 Sheikh Mohd, P.W.8 Gend Prasad Sharma, Head Constable No.460 and P.W.9 K.P.Banjare and after receiving Ex.P/1 to P/18 and Ex.D/1 into evidence, examined the accused under Section 313 Cr.P.C. After hearing the parties, the learned trial judge held that the prosecution was successful in bringing home the guilt and as the circumstances brought on record were clearly showing that the accused was the author of the crime, had convicted him for offences punishable under Sections 302 and 201 I.P.C. and sentenced him to death.

7). As required under Section 366 Cr.P.C. the learned trial judge made this reference for confirmation of the sentence and the accused being aggrieved by the findings recorded and the judgment delivered by the trial Court has filed Criminal Appeal.

8). When the accused was produced before this Court he informed us that he was unable to engage any counsel to project his defences, therefore, he be provided some legal assistance. Shri

Yashwant Tiwari, present in the Court volunteered to help and assist the case and cause of the accused. On the next date of hearing, Shri Kishore Bhaduri also offered his assistance to the Court.

9). We have heard Shri Yashwant Tiwari and Shri Kishore Bhaduri for and on behalf of the appellant and have also heard Dr.N.K.Shukla, learned Dy.Advocate General for the State.

10). Learned counsel for the appellant submit that the Court below in its zeal to convict the appellant and to award him the capital punishment has not only ignored the material pieces of the evidence, but has even ignored the basic principles of law. According to them, the facts which have been brought on record do not make out a case even for recording the conviction of the accused. They submit that a chronological detail of the events in comparision to the documents prepared by P.W.9 K.P.Banjare would clearly expose hollowness of the prosecution case and would show that present is a case of concoction and manufacturing of the evidence. They also submit that but for the two circumstances; firstly that the accused made a confession and secondly some parts of the body were recovered at the instance of the accused, no other evidence was brought on the record by the prosecution. According to them, these two circumstances if are examined on the anvil of basic criminal jurisprudence, it would clearly appear that the appellant is

innocent and he deserves to be acquitted. According to them, P.W.1 Mohd.Chand, P.W.7 Sheikh Mohd. and P.W.9 K.P.Banjare connived with each other and prepared a stage for sacrificing the accused for an act which he never committed.

11). On the other hand, Dr.N.K.Shukla,learned Dy.Advocate General submits that the personal knowledge about burial of the parts of the body of the deceased was exclusive to the appellant and as under his memorandum gunny bag containing the parts of the body was recovered from a pit, the Court below was absolutely justified in recording a finding against the appellant. He also submits that P.W.7 Sheikh Mohd., real son of the accused and P.W.1 Mohd.Chand, first cousin of the accused, had no reasons to speak unnecessarily against the appellant and if these two near relations of the accused are stating before the Court on oath that the accused confessed his guilt before number of the persons, then, there is no escape but to record a finding of the guilt. He also submits that the manner in which the accused committed murder of his own mother and tried to dispose of the body, capital punishment i.e. the extreme penalty was just and proper.

12). We have heard the parties at length and have gone through the complete records.

13). Before we proceed to discuss the matter

in its detail, a note is required to be appended at this stage. The marg intimation recorded under Ex.P/15 is in two pages. It appears that each page of the said intimation severed from the rest of the part; either the learned trial judge or some ministerial staff had pasted the torn off part to the rest of the part, but while doing so , part of page No.1 was pasted with page No.2 and part of page No.2 was pasted with page No.1. The said originals are still in the same position, but to properly appreciate the contents of Ex.P/15 , I have cut the page Nos. 37 and 38 and re-pasted them; after the said re-pasting, the said Ex.P/15 has become intelligible.

14). Ex.P/15, it appears, has not been properly read by the learned trial Court. It reads as under :-

> प्रार्थी सदर हमराह मो.चांद के साथ आकर जबानी रिपोर्ट दर्ज कराया कि इसकी दादी माँ ख्वाजन बी अपने धर में रहती थी, लेकिन अलग रहती थी, सब्जी बेचकर गुजारा करती थी, इसके पिताजी से मृतिका का जमीन संबंधी विवाद पर से बोल चाल बंद था इसलिये धर पर अलग रहती थी । दि. 3.10.99 को यह अपनी बीबी के साथ ससुराल ग्राम बागुर चला गया था । दि. 11.10.99 को धर वापस आया तब पता चला कि उसकी दादी माँ दि. 9.10.99 की शाम से लापता है । श्याम बाई के पास टमाटर छोड़कर गई थी, उसी के जरिये

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उसी के जरिये मालूम हुआ । अपनी रिस्तेदारी में तलाश करता रहा पता नहीं चला । आज दबे जुबान लोगों में चर्चा हो रही थी कि महिला की एक हाथ एवं पैर कटे हुए कूढ़ा सागर नाला के उपर में पड़ा है । तब यह मो॰ चांद, अजमल एवं राठौर के साथ देखने गया । तब देखा कि महिला का एक दाहिना हाथ पड़ा है । ऐड़ी एवं पटा पहनी है कुछ दूर में एक पैर पड़ा है । दोनों को जंगली जानवरों ने नोच डाला है । इसने हाथ की ऐड़ी एवं पटा देखकर पहचाना कि इसकी दादी ख्वाजन बी का हाथ है । शरीर का बाकी भाग नहीं दिखा । लेकिन वहीं पर नाले में बेशरम झाड़ी पर बोरी पानी के अन्दर पड़ी है । वहाँ से बदबू आ रहा है । रात्रि 9 बजे की बात है । कि थैले के अन्दर कुछ दिखाई नहीं दिया । कैसे घटना हुआ, इसे जानकारी नहीं है । कि रिपोर्ट पर मर्ग मुस्तजर कायम कर विवेचना में लिया गया । रिपोर्ट एस॰ डी॰ ओ॰ महोदय को भेजी है ।

We have already given the substance of the said Ex. P/15.

15). From a perusal of Ex.P/15 it would appear that on 13.10.99 the makers of the report i.e. P.W.7 Sheikh Mohd. and P.W.1 Mohd.Chand heard the whispers in the village and to verify the correctness of the said whispers, they went to the said nala there they found a piece of hand and leg. They also found that at some distance a submerged bag was lying from which bad smell was coming. After identifying the ornaments which were on the hand, found on the spot, they were convinced that it was of Khwajanbi. It would be material to note that theydid not express any suspicion against any-body, nor theyhad named any-body, who fed them the information .

16). At this stage, it would be necessary to look into the details of the investigation and the time at which a particular thing was done and the document was prepared.

(i) 3-10-99 - P.W.7 Sheikh Mohd. had gone to his in-laws place.

(ii) 9-10-99 - The deceased left tomatos with Shyam Bai.

(iii) 11-10-99 - P.W.7 Sheikh Mohd came back and was informed by Shyam Bai that the where-abouts of Khwajan Bi were not known to any-body.

(iv) 11-10-99 - 13-10-99 P.W.7 Sheikh Mohd. went in search of Khwajan Bi and also informed P.W.1 Mohd.Chand.

(v) 13-10-99 - at about 5.30 p.m. as stated by P.W.1 Mohd. Chand and P.W.7 Sheikh Mohd. some parts of the body of the

deceased Khwajan Bi were lying near Kuda Sagar rivulet.

(vi) 13-10-99 - at about 8.30 p.m. P.W.1 Mohd.Chand and P.W.7 Sheikh Mohd. went to the rivulet, found the pieces of the body, identified the same.

(vii) 13-10-99 at about 11.50 p.m. (almost after about three hours of recovery of the leg and hand) went to the police station , gave the information , did not express any suspicion against any-body. However, they did not inform the police that one Konda informed them about the pieces of the body.

(ix) 14-10-99 - at about 11.05a.m. - vide Ex.P/2 - pieces of leg and hand were identified by P.W.7 Sheikh Mohd. and P.W.1 Mohd. Chand;

(x) 14-10-99 - at about 11.30- vide Ex.P/4 - gunny bag, bones and Kurti (long shirt of the deceased) were seized.

(xi) 14-10-99 - at about-11.50 a.m. vide Ex.P/3 _____ part of right leg was seized.

(xii) 14-10-99 - at 12.10 p.m. - Vide Ex.P/1 Mohd.Chand P.W.1 lodged the Dehati Nalishi, which was recorded by P.W.9 K.P.Banjare.

(xiii) 14-10-99 time not known - vide Ex.P/5 - notice under Section 175 Cr.P.C. was given to the witnesses by P.W.9 K.P.Banjare.

(xiv) 14-10-99 - at 12.30 p.m. vide - Ex.P/6 Naksha Panchayat Nama of the body and head was prepared (it refers to the memorandum of the

accused prepared under Section 27 of the Evidence Act).

(xv) 14-10-99 -- at 1.15 p.m.- vide Ex.P/16 - Dehati Nalishi was converted into first information report. From the spot, it was taken by P.W.5 I.P.Yadav and was given to Gend Prasad Sharma, P.W.8 who recorded the F.I.R.

(xvi) 14-10-99 - at 2.10 p.m. - vide Ex.P/7 memorandum of the accused under Section 27 of the Indian Evidence Act was prepared, giving information about the body, head, axe, sickle and about the stains on his clothes.

(xvii) 14-10-99 -- at 3.15 p.m. - vide Ex.P/9 Seizure of body and head.

(xviii) 14-10-99 - at 3.25 p.m. vide Ex.P/17 -- Panchayat Nama (memo) regarding leg and hand;

(xix) 14-10-99 - at 3.35 p.m. - vide Ex.P/10, stained and plain earth were recovered from the alleged spot.

(xx) 14-10-99 - at 3.55 p.m. - vide Ex.P/8 axe, sickle and Kurta of the accused were seized.

(xxi) 14-10-99 -- at 6.30 p.m. - vide Ex.P/19 - the accused was arrested.

17). It would be also profitable to refer

to Ex.P/11 the spot map dated 14.10.99 , from where the head and stump of the body was recovered and Ex.P/12, the spot map, dated 14.10.99. of the place from where the leg and hand were recovered; Ex.P/13-A, application dated 14.10.99 for post mortem of the body and Ex.P/13 -post mortem report dated 15.10.99.

18). It is note-worthy that the kurti of the deceased, two gunny bags, stained and plain earth, axe, sickle and kurta of the accused were sent to the F.S.L. vide Ex.P/18, vide the report dated 17.1.2000, the F.S.L. reported that the Kurta belonging to the accused was stained with blood; while other articles were not so stained. It would be necessary to mention that kurti of the deceased was recovered from the spot; gunny bags were used for wrapping and packing the pieces of the body. Allegedly stained earth was recovered from the house of the accused. The axe and sickle were used for cutting the body into pieces. These articles which ordinarily should have been stained with blood were surprisingly not so stained.

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19) We are forced to give the details of time and the events because the same are going to play a material role in the present matter.

20) PW-1 Mohd.Chand, the first cousin of the accused stated in the court that on 13.10.1999 at about 3 P.M. Sheikh Mohd. (PW-7) came to his shop and asked him that his grand mother was missing. On this the witness asked Sheikh Mohd. since when the grand mother was missing. Sheikh Mohd.informed him that he had gone to his in-laws' place about 8 days back, had come back on Monday and since then grand mother was not seen,therefore, he had come to inform the witness. Sheikh Mohd. informed him that firstly he had gone to paternal aunt,thereafter,he had gone to Amiran Bi , the sister of the deceased and thereafter he had gone to parental house of the deceased but as she was not traceable at any place, he had come to the witness so that a report be lodged with the Police. According to the witness he asked Sheikh Mohd.to make a report at the Police Station.

21) According to PW-1,Mohd Chand in the same evening when he was standing on his fruit shop, one Kondha alias Nabi Bux called him and enquired from him that since when the deceased was missing. On that the witness informed said Konda that she was missing for last two days and Sheikh Mohd. was making a search for her. Konda alias Nabi Bux informed this witness that deceased has been murdered and her one hand and one leg were lying near Budha Sagar rivulet,where he found right hand below the elbow. The said hand had some ornaments on it. The witness thereafter lodged the Dehati Nalsi (Ex.P-1). According to him, apart

from right hand a piece of leg was also found near the rivulet and a bag containing pieces of the human body was also lying in the rivulet. Under Ex P-2 the witness had identified the pieces of the body. He clearly stated that Kurti belonging to the deceased and other parts of the body were seized on the spot. Thereafter, accused Bhim Mohd. was arrested and police made certain inquiries from him. The accused while being in custody of the police, made a confession in presence of this witness that he killed his mother by throttling and further informed the Police that he had cut the body into pieces. The memorandum Ex P-7 was prepared in presence of this witness. Ex.P-7, according to the document was prepared at about 2.10.P.M. on 14.10.1999. Thereafter accused Bhim Mohd. went to his house with the Police people, opened the lock and brought-out an axe and sickle. On the handle of the said axe there were stains of earth. Accused Bhim Mohd. also gave his Kurta, and Paijama and while giving the said clothes he informed the police that at the time of commission of the offence he was wearing the said clothes. The seizure of axe, sickle, Kurta and Paijama was prepared at Ex P-8 at 3.55 P.M. Thereafter, the police asked the accused that a part of the hand and leg have been recovered near the rivulet but where were the other parts of the body. On this, the accused made certain indications but the police people asked him to show the exact place. Accused thereafter took the police to a particular place near a pit. On further interrogation the accused pointed towards a particular pit from where head and stump of the body were recovered. According to the wintess, the seizure

was prepared on the spot under Ex P-9. Ex. P-9 was prepared on 14.10.99 at about 3.55 P.M.

22) In the cross examination the witness stated that prior to the incident he never lodged any report with the police about dispute of property between Bhim Mohd and deceased Khwajan Bi. It was suggested to him that the deceased was living with the witness for about one month but he denied the said suggestion. It was suggested to him that the shop of the accused and his shop were adjoining to each other,but the witness denied the suggestion. He however asserted that accused was working regularly in his shop. It was admitted by him that it was Konda who gave the information about the leg and hand. He also admitted that in his statement recorded under section 161 of the Code of Criminal Procedure,he did not inform the police about the confessional statement made by the accused.

23) From the statement of this witness it would clearly appear that on 13.10.99 he was informed by Sheikh Mohammad about missing of the deceased, he required Sheikh Mohd. to lodge the report with the Police. At about 5.30 P.M. he was informed By Konda that some parts of the body of the deceased Khwajan Bi were lying near the rivulet,there was some dispute about the property between the deceased and the accused and in his statement recorded under section 161 of the Code of Criminal Procedure,he did not inform the Police that accused confessed before him that he had committed the murder of his mother.

24) It would be important to note that he

received the information at about 5.30 PM, did not go to the spot upto 8.30 PM and even for next three hours did not lodge any report with the Police regarding hand and leg which were found near the rivulet and in his presence when Sheikh Mohd. was lodging the report, he did not express his suspicion against the accused. It would also be note-worthy that Konda alias Nabi Bux who gave the information to this witness, has not been examined by the prosecution. It would also be note-worthy that Shyamabai who gave the information to Sheikh Mohd. that deceased was missing for few days,has also not been examined by the prosecution.

25) PW-7 Sheikh Mohammad is the real son of the accused. According to him a dispute was going on between the accused and the deceased because the deceased had gifted or given away two acres of land to her daughter i.e. paternal aunt of the witness. According to him, the accused used to fight with the deceased and threatened her that some day he would cut her into pieces. According to him, he had gone to the police station for lodging the report but the police did not record the same and required him to make yet another search. When he was coming back from the Police station, Konda met him on way and informed him that a body was lying near the rivulet. On this, he had gone to the said place where he found a piece of hand and a piece of leg. There were some ornaments, on the right hand, lying on the spot. He immediately identified the said ornaments and pieces of the body. According to him, he immediately went to the Police station and lodged the report. According to him the policy party reached the spot at about 9 P.M.. The Police prepared certain documents on the spot and thereafter, accused Bhim Mohd.

was arrested.

26) It would be note-worthy that according to the witness the police came to the spot on the same night i.e. 13.10.99 and prepared the document Ex P-2 i.e. identification memo signed by PW-7 Sheikh Mohd. and PW-1 Mohd.Chand. Ex P-3 and P-4 under which the pieces of the body were seized were also prepared on the spot. The documents show that these were prepared on 14.10.99 at 11.30 AM and 11.50 AM. The accused had been saying all through that he was taken into custody on 13.10.99 and thereafter the things were manufactured against him. From the statement of PW-7 the prosecution case that the documents were prepared on 14.10.1999 would suffer a serious dent. The fact that the accused taken into custody on 13.10.99 would become probable and possible and the documents P-2, P-3 and P-4 being ante timed and ante dated would become probable.

27) In paragraph 7 the witness clearly made a statement that after the accused was taken into custody, interrogation was made and while the accused was in custody, in presence of the witness he informed the police that after committing the murder of deceased he had cut her into pieces.

28) The law on the question of confession and its admissibility is clear. If a confessional statement is made in presence of the police while the accused is in custody, the same would become inadmissible in evidence. Section 25 and section 26 of the Indian Evidence Act are anti-thesis to the admissibility of such confession. Section 25 says

that no confession made to a police officer shall be proved as against a person accused of any offence. Section 26 of the Indian Evidence Act provides that no confession made by any person whilst he is in custody of the police officer,unless it be made in the immediate presence of a magistrate,shall be proved as against such person. In view of such statement of PW-1 Mohd.Chand and PW-7 Sheikh Mohd. the confessional statements are inadmissible in evidence and the alleged confession made by the accused person shall not be proved against him,

29) In paragraph 8 of the cross examination PW-7 Sheikh Mohd.had stated that the dispute relating to property was pending in the court. He denied the suggestion that PW-1 Mohd.Chand was assisting the deceased in the said matter. He however,admitted that the shop of the accused is almost adjoining to the shop of PW-1. He also admitted that PW-1 Mohd.Chand owns a hotel and he was working in the said hotel. He admitted the fact that he did not inquire from his father about the whereabouts of the deceased. He did not enter in the house of Bhim Mohd. (accused). In paragraph 11 he gave the details about the search conducted by him. In paragraph 12 he stated that while he was making hectic search of the deceased, the accused was working in his own shop. According to the witness, Konda (not examined) usually go towards the rivulet to answer the nature's call, therefore,he must have seen the parts of the body. He asserted that Konda informed him that part of the leg and part of the hand lying near the rivulet were

of his grand mother. At this stage,we have to record that we are at loss to understand as to how Konda could identify the parts of the body. Examination of Konda could have thrown some light on these facts but unfortunately the prosecution in its wisdom did not choose to examine the said Konda. The witness further stated that he received the information first from Konda. He further stated that he was informed at the shop of PW-1 Mohd.Chand. He admitted the fact that after he lodged the report (Ex P-15),the Police detained the accused but further did not formally arrest him. In paragraph 15 he made a categorical statement that the deceased was not living with the accused. He also stated that if there was no urgent work,the deceased did not go to the house of the accused. He also admitted that as certain disputes were going on, the deceased and accused were not going to each other's house.

30) PW-2 Sameer Beg stated before the court that after hearing in the village that a leg and hand were lying in the rivulet, he had gone to the said place. Thereafter, accused Bhim Mohd. was arrested, Accused admitted before him that he had committed the murder of his mother and had buried the head and stump in a pit. Accused also informed the police about the weapons and produced an axe and sickle. It was suggested to him that about confessional statement he did not inform the police but he however denied the suggestion. In paragraph 7 he stated that leg and the hand found near the rivulet were of deceased Khwajan Bi.

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He denied the other suggestion given to him.

31) From the statement of this witness it would again appear that alleged confession was made by the accused when he was in the custody of the Police. From the statement of this witness it would also appear that at the instance of accused, head and stump were recovered from the pit.

32) PW-6, Salim also stated in the court that after hearing the whispers in the village he went to the rivulet where he found a part of the hand and the leg. The Police had come there and prepared certain documents. The accused was thereafter taken to his house where the accused confessed in presence of all that he had committed murder of his mother and thereafter, the accused produced the sickle, axe and his clothes. The accused informed the police that he had buried the head and stump in a pit from where the said parts of the body were recovered. In the cross-examination he admitted the fact that before he could reach the rivulet, the police had arrived there. According to him, he was unable to give the date on which the accused was taken into custody.

33) PW-3 Dr. A.K. Khare performed the autopsy. According to him the deceased died because of asphyxia as a result of throttling and body was cut into pieces after the death.

34) PW-4 R.C. Lahari had recorded Ex.P-15 on 13.10.1999 at. 23.50 (11.50 a.m.).

35) Dehati Nalsi Ex. P/1 was brought by PW-5 Ishwar Pd.Yadav to the Police Station which was

received by PW-8 Gend Prasad Sharma who in his turn registered the same as first information report. The said first information report has been marked as Ex P-16.

36) PW-9 K.P.Banjare, is the investigating officer. According to him on 14.10.99 at about 12.10 noon, he recorded Dehati Nalsi (P-1). On 14.10.99 at about 11.05 AM in presence of PW-1 Mohd.Chand and PW-7 Sheikh Mohd., he had made recoveries of the pieces of the body and some other articles. He had prepared Ex P-2, seizure memo. At about 11.55 from near the Sagone (Teak) tree, he recovered a part of the right leg which was seized under Ex P-3. On the same day at about 11.30 AM in presence of the witness he had seized the blood stained Kurti, blood stained gunny bag, which contained parts of the hand and part of paw with nails and 17 pieces of bones. He had prepared Dehati Nalsi Ex P-4 on the spot. On the same day at about 12.30 he prepared the Naksa Panchnama of body under Ex P-6. On the same day he prepared a memorandum for post mortem. On the same day at about 3.25 under Ex P-17 he had prepared yet another Panchnama. On 14.10.99 at about 2.10 PM in presence of the witness, he had recorded memorandum of the accused at Ex P-7. Unfortunately, the court below while recording the statement of the witness recorded the complete contents of the said Ex P-7, less realising that the confessional statement contained in Ex P-7 were not admissible in evidence. PW-9 further stated that accused informed the police that he had buried the head and stump of the body in a pit and while committing the crime his clothes were

stained with blood and he would also discover the axe and sickle which were used in commission of the offence. According to him on 14.10.99 at about 3.15 PM in presence of the witness he had recovered head and the stump of the body from a pit. Seizure memorandum was prepared at Ex P-9. On the same day at about 3.35 PM in presence of the witness he seized plane and blood stained earth from the house of the accused under Ex P-10. On the same day at about 3.55 PM in presence of the witness the accused produced axe,sickle,Kurta and Paijama which were seized in presence of the witness under Ex P-8. According to him,he had prepared the spot map of both the places on 14.10.99 itself.

37) In the cross examination it was suggested to him that Dehati Nalsi was registered by him on 13.10.99 but the suggestion was denied by him. He also denied the suggestion that the accused was taken into custody on 13th itself. He also denied the suggestion that accused stated before him that in fact PW-1 Mohd.Chand had committed the murder of the deceased. x

38) At this stage, the date and time of the events would assume importance. So far as Ex P-2, P-4 and P-3 are concerned,the same match the timings and the sequence of the incident given by all the witnesses. Ex P-2 was prepared at 11.05 AM, a piece of the hand and leg were identified by the witnesses Ex P-4 was prepared at about 11.30 and under this document in a gunny bag the bones and Kurti of the deceased were recovered. Under Ex P-3 prepared at about 11.50 AM pieces of the right leg of the

deceased were recovered. Ex P-1 Dehati Nalsi was registered at 12.10 PM. Though according to PW-9 K.P.Banjare all this was done on 14.10.99 but some other witnesses say that after P-15 was registered, at Police Station, Police had come to the spot in the same night.The body pieces were seized and certain documents were prepared at the spot. If that be so, Statement of PW-9 K.P.Banjare would become wrong. At this stage we would not say that his statements are false. The witnesses have clearly stated that Police arrived on the spot on 13.10.1999. PW-7 Sheikh Mohd. and PW-6 Salim have clearly stated that Police reached the spot on 13th itself. If the said witnesses are to be believed, then statement of PW-9 K.P.Banjare would be false .

39) According to the witnesses including K.P. Banjare (PW-9) after recovery of the hand and the leg near the rivulet a memo / Panchnama was prepared on the spot. According to him the Panchanama was prepared at about 12.30 PM. The document which was prepared at 12.30 is available on record as Ex P-6. Ex P-6 is not in relation to the hand and leg. It relates to recovery of the head and stump, which according to the witnesses were recovered at about 3.30 PM. Document Ex P-6 prepared at 12.30 refers to the memorandum of the accused prepared under section 27 of the Indian Evidence Act. The memorandum according to PW-9 K.P.Banjare, was prepared under Ex P-7 at 2.10 PM. It is surprising that Ex P-6 prepared at 12.30 refers to the document which did not come into existence upto 2.10 PM. We fail to understand as to how Panchnama Ex P-6 prepared at 12.30 noon could refer to the memo-

randum and the recovery of head and stump which did not come into existence upto 2.10 PM and 3.10 P.M. Ex P-6 was prepared in presence of Sheikh Mohd. (PW-7),Mohd.Chand (PW- 1), Sameer Beg (PW2),Salim (PW-6) and Santosh Hatile (not examined. Not even a single witness has stated ~~about the fact~~ that at about 12.30 the head and stump were ~~already~~ recovered. Each witness says that at about 12.30 noon a piece of the hand and a piece of leg were only recovered. If this panch-nama has to be relied upon then we have to hold that much before the preparation of this document, the memorandum of the accused was prepared and head and stump of the deceased were recovered. Unfortunately not even a signle witness suggests that, the memorandum of the accused was prepared at 2.10 PM under Ex P-7. A perusal of Ex P-7 would show that accused was informing the police that he had thrown a bag behind his Baadi and the other two bags near the Budha Sagar Rivulet. He was ready and willing to discover the same and was also ready to produce the axe,sickle and his blood stained clothes. If the memorandum of the accused was prepared at ~~x~~ 2.10 PM then recovery of the body at 12.30 would give a serious dent to the honesty and reliability of the prosecution case.

40) Under Ex P-9 at about 3.15 PM head and the body (stump) were recovered. This document has been signed by PW-1 Mohd.Chand and Santosh Hatile (not examined). We are surprised to see that head and stump were recovered at 3.15 PM ~~under~~ but Panchnama couldbe prepared at 12.30 noon. We are unable to understand as to how before the body

(47)

could be recovered, before the memorandum of the accused could be prepared, Panchnama relating to the body could be prepared.

41) Dr.N.K.Shukla, learned deputy Advocate General, makes a submission that there might have been some clerical error on the part of the investigating officer in writing the time on the top corner of the Panch Namas, therefore, the same could be ignored but we are unable to conceive to this argument. It is not the case of the prosecution that all the documents were prepared at one point of time or at one place, therefore, there was some scope of writing wrong timings at wrong places. The prosecution has come-out with the straight case that firstly a leg and hand were recovered, Panchnama was prepared and thereafter the accused was taken into custody, his memorandum was recorded and at the instance of the accused the head and the stump were recovered, and thereafter another Panchnama regarding recovery was prepared.

42) Ex P-17 was prepared at about 3.25 PM. This document has also been witnessed by PW-7 (Sheikh Mohd.), PW-1 Mohd.Chand, PW-2 Sameer Beg, PW-6 Salim and Santosh Hatile, (not examined). In this document two bags containing pieces of body were ~~recovered and~~ the leg and part of the hand were ~~also~~ referred . From the statement of the witness it would appear that this document was prepared on the spot much before the accused was taken into custody or before his memorandum ~~of~~ was prepared. We have already found that memorandum of the accused was prepared at 2.10 PM under Ex.P-7. If that be so, the time mentioned in Ex P-17 is not in accordance

with the sequence of events. We fail to understand as to how Ex P-17 could be prepared at 3.25 PM, much after the accused was taken into custody. The prosecution says that the leg,hand,two gunny bags, were recovered from the spot at about 12.30 PM. PW-9 K.P.Banjare has clearly stated that he had prepared Naksa Panchnama at about 12.30 and before that he had summoned the witness under Ex P-5. In fact, at about 12.30 hand , leg and gunny bag were recovered,but the document signed by the witness shows that the said Panch Nama was prepared by PW-9 K.P.Banjare at 3.25 PM. At about 3.25 PM blood stained and plane earth was recovered from the house of the accused under Ex P-8. At about 3.55 PM axe,sickle Kurta and Paijama belonging to the accused were recovered. Sequence of the events given by the witness and the sequence of events given in the document do not tally,rather go against each other. Under Ex. P-8 at about 3.55 PM the alleged incriminating articles were recovered but much before that at about 12.30 noon the body was recovered and in the said Ex P-6 a reference to the memorandum of the accused is also to be found. If at 12.30, much before the preparation of memorandum ,the body was recovered and the said memorandum finds place in Ex P-6 prepared at 12.30,then the said memorandum would lose its importance and would not be admissible in evidence. The recovery / discovery pursuant to the memorandum Ex P-7 would all become immaterial and would lose their importance. The recovery made under Ex P-8 would become doubtful. At this stage, it would again be important to refer to Ex P-18 the report of the serologist.

(43) The Serologist had marked 'Kurti' of the deceased as article-A, gunny bags as articles B-1 and B-2 earth as articles-C & D, Axe as article-E, Sickle as article-F and Kurta of the accused as article-G. According to the report of Serologist, articles A, B-1, B-2, C, D, E & F were not stained with blood. The Kurta of the accused was stained with blood. It would be necessary to note that Kurti of the deceased was found on the spot and according to each of the witnesses, it was stained with blood. The gunny bags articles B-1 & B-2 were used for packing and wrapping the pieces of the body, the stained earth was recovered from the house of the accused and article-E the Axe and article-F the Sickle were used in the commission of offence. Ordinarily, articles A, B-1, B-2, either C or D, article-E and article-F should have shown positive results to Benzedine Phenolphthalein test. Non-availability of the blood stains on these articles would lead to only one presumption that these articles were not connected with the crime or atleast were not recovered from the spot and the alleged weapons were not used in commission of the offence.

(44) The learned trial Court did refer to the statements of the witnesses, but unfortunately did not care to look into the time mentioned in each of the documents. In paragraph-17, the learned trial Judge observed that the prosecution was banking upon the circumstantial evidence, but while taking into consideration the said circumstance, it did not appreciate the law laid down by this Court and the Supreme Court.

(45) The prosecution had projected the dispute relating to the land as the motive for commission of offence. Before we come to the evidence of motive, we would prefer to refer to section 8 of the Indian Evidence Act. Section 8 of the Indian Evidence Act reads as under:-

> "8. Motive, preparation and previous or subsequent conduct.-- Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> The conduct of any party, or of any agent to any party, to any suit or proceeding or in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto."
>
> "Explanation 1.- The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.
>
> Explanation 1.- When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant."

The motive is "that which moves or induces a person to act in a certain direction". It is that which is in his mind and which moves him to act, and whether

the belief which produces that state of mind is true or false; the motive remains the same and the truth or falsity of the belief is not really questioned . The motive is reality to the act as cause to the effect and an act without a motive would be an effect without a cause. If there is evidence to show that a particular accused committed an offence, then, availability of motive in a given case would become immaterial. But in case which is based on circumstantial evidence, the presence or availability of motive strengthens the prosecution case. Failure to discover the motive for an offence does not signify its non-existence; and failure to produce evidence of motive, though it may constitute a weakness in the whole body of proof is not fatal as, in law, proof of motive is no more necessary than the proof of any other relevant fact. If the motive is projected by the prosecution, the Court has to consider it and see whether it is adequate. Mere evidence of motive can never supply the want of reliable evidence direct or circumstantial, of the commission of crime with which an accused person is charged. Mere existence of motive is by itself not an incriminating circumstance and an accused cannot be convicted because of the alleged motive. It raises a strong suspicion that the accused might have committed the crime, but suspicion cannot take place of positive proof. Motive assumes importance only when direct and credible evidence is not available and the case rests upon circumstantial evidence. Motive is not an

indispensable link in the chain of circumstantial evidence nevertheless it is a strand that runs through all the links and helps to forge a complete chain. In a case of circumstantial evidence, the prosecution is bound to complete the chain on one hand of which stands the crime and the other hand of the chain ties the accused. If any link is missing or the chain is not complete or properly forged, then the benefit would not be given to the prosecution, but every benefit of doubt would go in the account of the accused.

(46) Under section 8 of the Evidence Act, a motive is provable as a relevant fact, but it cannot be proved by hearsay evidence. By proving the motive, the prosecution can rely upon the conduct of the accused whether previous or subsequent. The conduct made relevant by section 8 is conduct which is directly and immediately influenced by a fact in issue or relevant fact and it does not include actions resulting from some intermediate cause, such as question or suggestions by other persons. Though section 8 of the Indian Evidence Act does not talk of the conduct of a witness, but while appreciating the evidence, the conduct of the witnesses is also to be appreciated like any other fact and is to be taken into consideration. Whether in a particular case the conduct of the accused is a relevant factor, or it is not, depends for decision on the facts and circumstances of each particular case. Even if the accused fails in his defence, benefit would not go to the prosecution case. The prosecution is always obliged and duty bound to

bring home the guilt. The accused is only required to give dent to the reliability of the prosecution evidence whether oral or documentary and if he succeeds in it, then the Court may reject the prosecution case in its totality. The motive in a given case may provide the foundation for convicting the accused, but before a man is hanged or is convicted, the foundation must be very strong so that it can bear the weight of the capital punishment.

(47) The conduct of the accused, in getting certain facts and articles discovered would always be material, but if nok material fact is discovered then the evidence submitted by the prosecution would not take the place of positive proof. The prosecution through the mouth of witnesses brought on the record that as the deceased had gifted or given away 2 acres of land to her daughter, the accused was annoyed with his own mother, the deceased. Unfortunately the prosecution did not bring on record that to whom the land was given,when it was given and how it was given. The person to whom the land was given was not examined by the prosecution. Not even a single revenue entry has been brought on record to prove that a particular piece of land was given by the deceased to her daughter. No body knows as to when and how the land was given by the deceased to her daughter. What was possessed by the deceased and after giving property to her daughter what was left with her is also not on the record. The motive for commission of crime is the alleged gift of the land. The prosecution even failed in bringing on record that how the accused was to be benefitted after

committing the murder of his own mother, Nothing has been brought on record to show or suggest as to who was in possession of the said 2 acres of land, no body says that after committing murder of the deceased the accused could obtain the possession of the property. Though the witnesses have stated that for a long time, some dispute was going on between the mother and the son, but the witnesses did not clarify the position and felt content by saying that some dispute was going on. The alleged threat of the accused that he would kill his mother and cut her into pieces would not assume any importance because no body has said that on some earlier occasion the accused made some attempt on the life or limb of the deceased. P.W.7 SheikhMohd. has admitted that the dispute relating to the said piece of land was pending in the Court, but the prosecution even did not care to bring the said documents on record. When certain facts could be proved by documentary evidence then non-production of those documents would certainly lead to an adverse inference against the prosecution that if said documents were produced in evidence, the same would not have helped the prosecution case. We are unable to concede to the theory of the alleged motive. Section 3 of the Indian Evidence Act says 'Evidence' means and includes--(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence; (2) all documents produced for the inspection of the Court: such documents are called documentary evidence. For proof of circumstantial evidence, 4 things are

essential that (i) that the circumstances from which the conclusion is drawn be fully established.(ii) That all the facts should be consistent with the hypothesis. (iii) That the circumstances should be of a conclusive nature and tendency. (iv) That the circumstances, should, to moral certainty actually exclude every hypothesis but the one proposed to be proved. It would be incorrect to say that what the Court has to consider is whether the cumulative effect of the circumstances establishes the guilt of the accused beyond "shadow of doubt". The 'shadow of doubt' even in cases which depend on direct evidence is shadow of "reasonable doubt" in its practical application. The test which requires the inclusion of other alternative hypothesis is far more rigorous than the test of proof beyond reasonable doubt. In case of the circumstantial evidence, if the prosecution is not required to prove the case beyond 'shadow of doubt' or beyond 'reasonable doubt' atleast it is required to prove its case to the 'reasonable certainty'. The prosecution cannot say that as the evidence brought on record raises the finger of suspicion against the accused only, he must be convicted. It is trite to say that suspicion however strong it is, cannot take place of the positive proof.

(48) The prosecution can always say that in the given set of circumstances and on the strength of the evidence available on record, the Court may or should presume a particular fact. Under section 4 of the Evidence Act whenever it is provided by the Act that the Court may presume a fact, it may either

record such fact as proved unless and until it is disproved, or may call for proof of it. Whenever it is directed by the Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The presumption of fact is a natural presumption. These presumptions are always permissive, rebutable and do not constitute a branch of jurisprudence. The presumptions of law or artificial presumptions are always obligatory may be rebuttable or irrebuttable and constitute a branch of jurispredence.

(49) Presumption is an inference of fact drawn from other known or proved facts. It means a rule of law, that courts shall draw a particular inference from a particular fact or from a particular evidence, unless and until the truth of such inference is disproved. Presumptions help in determining the estimation of probative force of evidence by bringing the probative force under some inflexible rules excluding judicial discretion. The presumptions may be raised on the stock of evidence available on the record unless the laws say that the Court shall presume a fact unless and until it is disproved. There may be cases where the burden to disprove the presumption is on the accused. But, present is a case where the prosecution is not relieved of its burden of proving the facts and providing a foundation for raising a presumption. Section 114 of the Indian Evidence Act says that the Court may presume the existence of any fact which it thinks likely to have happened regarding being had to the common course of natural events, human conduct and public and private business in their relation

to the facts of the particular case. The term that presumption of 'fact' is used to designate an inference of affirmative or disaffirmative of the existence of some fact drawn by Court, by a process of probable reasoning from some matter of act, either judicially noticed, or admitted, or established by legal evidence to the satisfaction of the Court. Without inferring the existence of the fact from others, courts of justice do nothing more than apply, under the sanction of law, a process of reasoning which the mind of any intelligent being, would not in similar circumstance, ever apply for itself; and the force of which rests altogether on experience and observation of the course of nature, the constitution of human mind, the springs of human action and the usage and habits of Society. The prosecution says that as the accused knew about the head and stump (body), it must be presumed in absence of any explanation given from the side of accused that after committing murder of his mother he cut the body into pieces and threw the same in a pit. This argument is basically based upon the alleged recovery made at the instance of the accused. We have already found that the body was recovered under Ex.P.6 at 12.30 noon while the memorandum of the accused u/s 27 of the Indian Evidence Act was prepared at 2.10 p.m. How can we hold that the body was discovered under the memorandum or at the instance of the accused even when the body was already recovered much before the memorandum was prepared. The Naksa Panchayat Nama (Ex.P.6) prepared at 12.30 noon fixes a death nail in the argument of the prosecution.

For raising a presumption, there must be positive proof of a particular fact which provides a foundation for raising a presumption in favour of a particular event. If the very foundation is not available, a castle cannot be built in the air. A foundation yet not founded cannot provide a foundation for raising a presumption. From the statements of P.W.9 K.P.Banjare, it would clearly appear that he had prepared the Panchayatnama of the body and head under Ex.P-6 at 12.30 noon while he himself had prepared the memorandum of the accused under Ex.P.7 at 2.10 p.m. The foundation that the body was discovered at the instance of the accused is not in existence. How could the body be recovered at the instance of the accused at 12.30 noon when he had given the information to the Police or the witnesses for the first time at 2.10 p.m. ? It is not a matter of magic or intuition that the accused was to give a memorandum at 2.10 p.m., therefore, the said memorandum could be referred to in a document prepared at 12.10 noon. The recovery at the instance of the accused cannot be relied upon.

(50) The other circumstance on which the Court below relied upon is the recovery of weapons of offence and Kurta, Paizama of the accused which are said to be stained with blood. Unfortunately, the Court below failed to see that the articles which ought to have been stained with blood are surprisingly not stained with blood. The Kurti of the deceased found on the spot and the gunny bags in which the body was allegedly packed and wrapped are not stained with blood. If some small stain of blood is found on the Kurta of the

accused, this may provide a small circumstance against the accused but would not be clinching evidence against him to hang him. The presumption certainly could be raised against the accused if the body was recovered at the instance of the accused ~~was discovered~~ after preparation of the memorandum.

(51) There is always a distinction between a presumption and burden of proof. The burden of proof to bring home the guilt is always upon the prosecution. The prosecution can prove its case by producing direct evidence, oral evidence or circumstantial evidence. The prosecution can always ask the Court to raise presumptions relating to a particular fact, but before making the said request to the Court, it is bound to provide the facts and figures to the Court on foundation of which a presumption can be raised. The burden of proof to prove a particular thing is always upon the prosecution. It cannot be shifted. The accused is not required to prove his innocence. The basic criminal jurisprudence says that there is always a presumption of innocence in favour of the accused.

(52) The law presumes the innocence of a person charged with a crime until the contrary is proved to a reasonable certainty. A prima facie case does not take away from an accused a presumption of innocence. Where there are conflicting presumptions, the presumption of innocence will prevail against the presumption of crime. Where no motive for commission of a crime is shown, the presumption of innocence of the suspected

person is strengthened. A motive is proved by showing the seizure or gain, the gratification of passion but the motive in itself is not sufficient to presume the act on the part of the accused.

(53) The prosecution wanted to suggest and the learned Court below has also held that the deceased was living in the house of the accused, the accused committed the murder of deceased in his house and cut the body into pieces. Unfortunately, the Court below lost sight of the fact that even according to the complainant Sheikh Mohmad (P.W.7), the deceased was not living with the accused. The stained earth alleged to be recovered from the house of accused, the axe and the sickle, according to the FSL report, were not stained with blood. The circumstances on which the prosecution relies do not make out a complete chain. There are unfolded mysteries in the prosecution case. Unfortunately the Court below has provided the umbrella of benefit of doubt to the prosecution.

(54) In paragraph-50, the learned Judge has observed that as the accused was repeatedly saying that he would beat or cut his mother, it would point towards his guilt. Unfortunately, the Court below has read something in the evidence which is not in such terms. The Court below has found yet another circumstance that while P.W.7 Sheikh Mohd. was making search of his grand mother, the accused did not try to know about the whereabouts of the deceased. In our opinion, the Court below, again failed to look into the conduct of P.W. 7 Sheikh Mohmmad and P.W.1 Mohmmad Chand. Right from 11th to 13th October 1999, P.W.7 Sheikh Mohd. did not ask his father i.e., the accused about the whereabouts

of the deceased. Is is not expected of a son ~~not~~ to enquire from his father about the whereabouts of the grandmother. Would it not speak against the conduct of P.W.7 ? Would it not show that the relations between father and son were so bitter that the son did not deem it fit to enquire from his father about the grand mother's whereabouts. Would it not speak against the conduct of P.W.1 Mohd.Chand that after receiving the information that the deceased was missing he did not enquire from or inform the accused that the mother of the accused was missing. How can it be presumed that the accused knew that his mother was missing when from the statement of P.W.7 Sheikh Mohd. it is clear that the deceased had bitter relations with the son and was not going to his house for days together. How can we persuade ourselves to presume that the accused knew that his mother was missing.

(55) Would the facts available on the record not speak against the conduct of P.W.1 Mohd.Chand that after receiving the information about pieces of the body lying near the rivulet he did not ~~xx xxx~~ tell the accused that the body of the mother of the accused was lying near the rivulet. How can one ~~xx~~ justify the conduct of P.W.7 Sheikh Mohd. that after receiving the information from Konda, he did not inform his own father that pieces of the body of the mother of accused were lying near the rivulet. who says that Konda or any-one-else had informed the

accused that pieces of his mother's body were lying near the rivulet. On one side, prosecution says that Konda supplied the information to P.W.1 Mohd. Chand and Sheikh Mohd.(P.W.7), but nobody on the other side says that said Konda ever supplied the information to the accused. The conduct of the accused, in fact, shows that he was calm and quiet and he worked in his fruit shop. The learned court below was unnecessarily influenced by the fact that the accused did not try to make a search of his mother and did not go to the said rivulet to see the pieces of the body.

(56) The learned Court below has relied upon the circumstance to hold the accused guilty, that immediately before the death or murder, the deceased was living with the accused. Unfortunately, the Court below did not take into notice the statement of P.W.7 Sheikh Mohd who ~~xxxx~~ clearly stated that the deceased was not living with the accused and was not going to his house unless there was some urgency. The learned Court below has also relied upon the recovery of the head and stump (body) of the deceased from the pit at the instance of the accused. We are sorry to note that the Court below has failed in its duties while appreciating or scrutinising the evidence and has given a wrong conclusion. Even for the sake of the repetition, we would again say that the Panchayatnama of body and head were prepared under Ex.P-6 at 12.30 noon while the memorandum of the accused was prepared under Ex.P.7 at 2.10 p.m. The body was already

recovered much before the memorandum of the accused was prepared u/s 27 of the Indian Evidence Act. The said recovery cannot be thrusted upon the head of the accused. What was already recovered at 12.10 could not be recovered or discovered on the memorandum of the accused which was prepared much after recovery of the body. The Court below has also relied upon the recovery of Axe, Sickle, Paizama, Kurti/Kurta. We have already found that Axe and Sickle were not stained with blood and a small stain of blood on the body of the accused would not provide a positive foundation for raising a presumption against the accused. The Court below has also relied upon the circumstances regarding recovery of the body(stump) stained with weapons and the clothes and has further observed that non-explanation on the part of the accused leads to a presumption against the accused. In our opinion and for the reasons given above, these facts would not provide a foundation for raising a presumption against the accused. The learned court below has relied upon the conduct of P.W.7 Sheikh Mohd. to hold that if a son without any enmity or ill-will ~~ox~~ speaks against his father, then such evidence is reliable. In our opinion, the displaced confidence reposed by the learned trial Judge on the statement of P.W.7 Sheikh Mohd. is contrary to law. We have already considered the conduct of P.W.7. The Court below has not taken into consideration the ~~x~~ conduct of P.W.7 Sheikh Mohd. It has not appreciated the fact that if the son does not talk to his father about the whereabouts of his own grand mother, then, the conduct of the son is bad. The conduct of P.W.7

does not inspire any confidence; firstly because he did not make any enquiries from his father, secondly, did not inform him about the recovery of the pieces of the body and lastly did not speak even a single word against his father while giving information under Ex.P-15.

(57) The Court below has also relied upon the statements of P.W.1 Mohd. Chand to raise a presumption against the accused. It also observed that the said witness has given positive evidence about the memorandum and the recoveries. Said Mohd. Chand from his conduct does not appear to be reliable. If Mohd. Chand accompanied P.W.7 Sheikh Mohd. when Ex.P-15 was recorded, it was expected of him to project his suspicion against the accused to the Police, he did not do so. All of a sudden, on 14-10-1999 at about 12.10 noon, he started raising suspicion against the accused. Even after knowing about the fact that Khwajan-Bi was missing, he did not make enquiries from the accused. Even after finding that body pieces of Khwajan Bi were recovered from near the rivulet, he did not supply the information to the accused. Is it expected of a brother that he would not inform his brother that his mother died and her body pieces were found scattered near the rivulet.

(58) So far as the memorandum and seizures are concerned, we have already found that the same are manufactured and concocted. The recoveries/discoveries were made much before the memorandum u/s 27 of the Evidence Act was prepared. The alleged confession was

made by the accused when he was in Police custody. The Court below was unnecessarily influenced by the fact that Kurta of the accused was stained with blood. It was expected of the Court below to look into the attending circumstances. According to the prosecution, the Kurti of the deceased was found near the spot, the bags were used for packing and wrapping the pieces of the body, the earth was stained with blood and the weapons were used in commission of the offence. Unfortunately, the Court did not see that all these articles which were supposed to be stained with blood or which ought to have been stained with blood were not so. The last of the circumstance on which the Court below has relied upon is the post-mortem report. There is no doubt that the deceased was murdered and thereafter her body was cut into pieces, but the prosecution was required to prove as to who committed the ghastly crime and cut the body into pieces. The 11th circumstance referred to in paragraph 50 of the Judgment of the Court below, in the opinion of this Court, do not provide a foundation nor do complete the chain to hold that it was the accused who committed the said crime.

(59) In the opinion of this Court, the Court below was absolutely unjustified in convicting the appellant. The evidence produced by the prosecution falls short in proving the guilt of the accused. The prosecution by its evidence has simply pointed the needle of suspicion towards the accused, but has failed in proving that it was the accused who committed the crime.

(60) In our opinion the findings recorded by the Court below are contrary to law and the evidence

available on the record. We set aside the findings recorded by the Court below and acquit the accused of the charges.

(61) Before we part with the case, we would like to discuss about the imposition of death sentence. Whether the manner of commission of crime should be the foundation for awarding the capital punishment or the manner in which the body was disposed of should provide the foundation for awarding the capital punishment. U/s 354(3) of Cr.P.C. every Court is obliged to state the reasons for the sentence awarded and in the case of death sentence special reasons are required to be stated. Award of life sentence i.e., other than the death sentence is the general rule and only special reasons, that to to say, special facts and circumstances in a given case would warrant passing of the capital punishment. In the matter of Bachhan Singh, AIR 1980 S.C. 898, the Supreme Court has laid down the guidelines to be applied to the facts of each individual case where the question of imposing of death sentence arises ; (i) the extreme penalty of death sentence need not be inflicted except in rarest of rare cases of extreme culpability,(ii) before opting for the death penalty, the circumstances of 'offender' are also required to be taken into consideration along-with the circumstances of 'crime' (iii) life imprisonment is the rule and the death sentence is an excep-

tion (iv) a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before option is exercised. Before award of sentence, the questions must be asked and answered: (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence; (b) Are the circumstances of the crime such that there is no alternative, but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?.

(62) In the matter of Machhi Singh, AIR 1983 S.C. 957, the Supreme Court made important observations with respect to death sentence. According to the Supreme Court what constituted the rarest of rare cases which warrant infliction of a death sentence are(1) manner of commission of murder---when the murder is committed in an extremely brutal, grotesque, diabolical revolting or dastardly manner so as to arouse intense and extreme indignation of the community; (2) motive for commission of murder--when the murder is committed for a motive which evinces total depravity and meanness; (3) anti-social or socially abhorent nature of crime--when murder of a member of a Scheduled Caste or minority Community etc., is committed not for personal reasons, but in the circumstances which arise social wrath.

This would also cover bride burning and dowry death cases; (4) magnitude of crime--when the crime is enormous in proportion, for instance, when multiple murders say of all are almost all of the members of a family or a large number of persons of a particular caste, community or locality, are committed; and (5) personality of victim of murder --when the victim of murder is an innocent child or helpless person or a public figure. The Supreme Court also observed that if upon taking an over all global view of all the circumstances in the light of the aforesaid propositions and taking into account, the answers to the questions posed the circumstances of the case are such that the death sentence is warranted, the Court must proceed to do so. Proper guidence can also be sought from the judgments of the Supreme Court reported in 1983 Criminal Law Journal, 971; 1980 Criminal Law Journal 636, 1976 Criminal Law Journal 580; 1974 Criminal Law Journal 683; 1973 Criminal Law Journal 730. From the judgment of the Court below it appears that it was not influenced by the manner in which the murder was committed, but it was influenced by the manner in which the body was sought to be disposed of.

(63) We do not propose to say that the manner in which the body of a deceased is disposed of should not influence the mind of a ordinary person, but the Court should not forget that it is to convict a man and award sentence to him for what he has done, at the first instance and not by the manner in which

after committing the crime he reacted. If in this case it is to be held that the accused did commit the murder of his mother, then, the effect would remain that he committed murder and after committing murder, realising that he would be caught or punished, he disposed of the body in a particular manner. The disposal of the body in a particular manner would be punishable u/s 201 IPC and could not provide a foundation for awarding the capital punishment. The Court while awarding capital punishment should not forget that in fact, after awarding the sentence, it is putting hang man's rope in the neck of the accused and is killing him every day before the disposal of the reference made by it. One must put himself in the position of the person who has been condemned to death. A Judge or Court should not ordinarily award an extreme penalty or capital punishment because that is not the rule. The Court must put questions to itself that is the case on hand is rarest of rare or is a case of ordinary commission of crime. One could justify the award of capital punishment if the medical report said that the deceased was buchered or cut into pieces while she was alive. The approach of the Court below even in awarding capital punishment was bad, it cannot be approved.

(64) Before final verdict, we would like to express our thanks to Shri Yashwant Tiwari and Shri Kishore Bhaduri, Advocates, who volunteered to assist the accused and assisted the Court to the best.

(65) For the reasons stated above, the appeal deserves to and is accordingly allowed. The conviction recorded and the sentence awarded to the appellant are set aside. He is acquitted of all the charges. He be immediately released if not required in connection with any other offence. A copy of this judgment be sent to the learned trial Court for future guidance.

Sd/-
Chief Justice

Sd/-
R.S. Garg
Judge